

Legal Aspects of RtI

by

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The Child-Find Duty vs. Response-to-Intervention Initiatives

- **Definition of Child-Find**—Child-find is the term used to describe the legal obligation imposed by the IDEA on public school districts to “find” children that may be disabled and in need of special education services. Under the IDEA, schools have an *affirmative* duty to identify, locate, and evaluate students who they suspect may be disabled, in order to evaluate them for potential eligibility for special education services. 20 U.S.C. §1412(a)(3); 34 C.F.R. §300.111. Meaning, that it is not enough for schools to wait until parents inquire about, or request, an IDEA evaluation based on suspicion of disability. Schools must maintain a system of notices, outreach efforts, staff training, and referral processes designed to determine when there are reasonable grounds to suspect disability and potential need for special education services.
- **What “triggers” Child-Find?**—Court cases have established, based on the provisions of IDEA and its regulations, that the child-find obligation to evaluate a student is triggered when and school district has reason to suspect that (1) the student has a disability, and (2) a resulting need for special education services. 34 C.F.R. §300.8(a); *El Paso ISD v. R. R.*, 567 F.Supp.2d 918 (W.D.Tex. 2008).
- **How do we know if a school complied with Child-Find?**—The *El Paso ISD* case set forth a two-step analysis to review whether a school complied with its child-find responsibilities: first, a court examines whether the school had reason to suspect that the student had a disability and a consequent need for special education services (i.e., the “trigger” circumstances outlined above); second, the court addresses whether the school evaluated the child within a reasonable time after the reason to suspect a disability that needs special education services arose.
- **IDEA 2004 and Early Intervention Services**—In 2004, the Congress acted on concerns related to the increasing number of students in special education, and the suspicion that many students might have avoided the need for placement in special education if interventions had been provided to the students at an early stage in their education, by including provisions in the IDEA emphasizing its desire that students receive early interventions when they struggle at school. Specifically, the law allows schools to use up to 15% of their allotted IDEA-B funds for early intervening services for students not currently identified as special education students, but who need additional academic and behavioral support to succeed in the general education environment. 20 U.S.C. §1413(f); 34 C.F.R. §300.226.
- **Response to Intervention**—Moreover, a variety of experts from a number of

different disciplines noted that the special education system in the U.S. represented a “wait-to-fail” dynamic, under which students must show significant educational deficits before they can receive high-quality additional educational services. Instead, they advocated for a system that emphasized interventions within the regular education environment first, and then case-by-case educational decision-making based on struggling student’s response to high-quality research-based interventions. This sea change in educational thinking has come to be encapsulated in the phrase “response-to-intervention,” or RtI.

Note—The confluence of early intervention programs and RtI-oriented regular education interventions has potentially already delivered some change to the system. According to the Data Accountability Center, the number of students aged 6-21 that receive IDEA Part B services has dropped 3.9% from 2004 to 2009. The number of LD students declined by 12.4% in the same timeframe. See www.ideadata.org.

- ***OSEP states that RtI initiatives cannot be used to delay or deny evaluations***—In a 2011 letter, OSEP indicated that “it has come to the attention of the Office of Special Education Programs (OSEP) that, in some instances, local educational agencies (LEAs) may be using Response to Intervention strategies to delay or deny a timely initial evaluation for children suspected of having a disability.” *Memorandum to State Directors of Special Education*, 56 IDELR 50 (OSEP 2011). The memo states that while OSEP supports RtI initiatives and programs, “the use of RTI strategies cannot be used to delay or deny the provision of a full and individual evaluation, pursuant to 34 CFR §§300.304-311, to a child suspected of having a disability under 34 CFR §300.8.”

Note—OSEP, however, does not disapprove of state regulations advising schools to explore or consider RtI programs prior to deciding to evaluate the student, as long as the regulation does not prohibit a parent from referring a child prior to the completion of the RtI program, or require the program as a prerequisite to evaluation. *Letter to Ferrara*, 60 IDELR 46 (OSEP 2012).

Modern Questions and Disputes

There is no lack of consensus on the child-find analysis set forth above. The child-find obligation imposed under the IDEA, however, is currently being applied in an context where the educational system is attempting to emphasize the provision of regular education interventions for struggling students *prior to* deciding to refer them for an IDEA evaluation. In many situations, campuses are asked to provide documentation that they have implemented serious interventions to address a student’s difficulties in the classroom before a referral will be allowed to proceed to evaluation. The advent of response-to-intervention methodology, together with an expanding range of interventions available outside of special education, have created a tension with schools’ simultaneous need to ensure compliance with IDEA child-find requirements, particularly in cases where parents are approaching the school with concerns about their children’s performance or straightforward requests for testing. While schools are expending resources and energies on making effective use of interventions outside of special education for struggling students, the child-find requirement is nevertheless

present. And, certainly, a number of students that meet criteria for regular ed interventions are struggling due to the effects of disabilities, particularly learning disabilities

- *The New Tough Questions*—Establishing and using high-quality research-based interventions for students that are struggling to meet grade-level standards, however, creates new questions with respect to public schools’ obligation to identify students who may be disabled and in need of special education services, including the following:

At what point should a school suspect that students struggling with the curriculum and receiving regular education interventions are potentially LD?

How long should a student receive regular interventions without significant improvement before the school moves to initiate an IDEA evaluation?

What is the child-find obligation if a child is moving through the tiers of intervention programs with some improvement, but still with deficits in achievement?

How should schools handle parents’ requests for evaluations when interventions have only begun to show promise?

How can schools avoid failure-to-identify IDEA hearing claims while attempting to make best use of regular education interventions prior to referral?

What role do campus assistance teams play in the RtI process and the decision to refer a child to special education?

It is in this area that we are likely to see the most RtI-related litigation. Questions may be raised about the timeliness of implementation of high-quality interventions, the rate of the student’s progress in the interventions, the timeline for interventions (particularly in tiered, lengthy intervention models), and situations where parents were encouraged to allow interventions to proceed only to lead to limited progress and delayed placement in special education.

The Federal Regulation on Referral

The applicable federal regulation similarly envisions that interventions will be considered for a struggling child, but that the parent retains the right to request an evaluation. The exact wording is the following

The public agency must promptly request parental consent to evaluate the child to determine if the child needs special education and related services, and must adhere to the timeframes described in §§300.301 and 300.303, unless extended by mutual written agreement of the child’s parents and a group of qualified professionals, as described in §300.306(a)(1)—

- (1) If, prior to a referral, a child has not made adequate progress after an

appropriate period of time when provided instruction, as described in paragraphs (b)(1) and (b)(2) of this section; and

(2) Whenever a child is referred for an evaluation. 34 C.F.R. §300.309(c).

- **School refusal of evaluation**—Of course, schools can refuse to refer the student, and then provide parents with written notice of refusal and notice of procedural safeguards. This course of action, however, creates the possibility of a failure-to-identify hearing request. If the parents prove that there are reasonable grounds to suspect disability and need for special education services, then the school loses the case and will be ordered to evaluate the student (and be potentially liable for the parents' attorneys' fees).

Note—As discussed below, the low-risk option would appear to be for schools to indicate their commitment to continuing the interventions, while at the same time making clear to parents that they will respect their decision to refer the child for evaluation if that is what they want. Of course, there might also be situations where the request for evaluation is so unwarranted that a denial of evaluation may be supportable.

Addressing Parental Requests for IDEA Evaluation

Certainly, a school addressing the difficulties of a student who is struggling academically is free to consider, explore, and apply its range of intervention options prior to deciding on a referral for special education evaluation. The circumstance changes, however, when the parent approaches the school asking for special education testing. Because the parent has a right to request evaluation, and can take legal action against the school if it fails to act on the request, a parent referral places the school in an entirely different situation. These scenarios can easily lead to disputes, as the cases below show.

- The recent case of *Student v. Austin ISD*, 110 LRP 49317 (SEA Texas 2010) illustrates the push-pull of the intervention vs. referral dynamic, together with how its landscape may confuse a parent concerned that their child may have a disability that is going undetected.

The factual sequence—Since the age of three, the boy in question had been diagnosed with ADHD. In addition, his grandmother/guardian was concerned about his life-skills competencies. Although he passed the statewide reading assessment (probably in 3rd grade) on a second administration, the school was concerned enough about his reading that it involved a reading specialist and provided him with small-group reading support. Concerned about his performance, the grandmother consulted with a neurosurgeon, who contacted the school principal about the possibility of qualifying the boy as OHI ("Other Health Impaired"). In addition, the doctor provided the school with a prescription for neuropsychological testing to further substantiate the request for consideration of special education services. The school, however, failed to follow up on the request for consideration of testing or OHI eligibility.

Subsequently, the grandmother contacted the students 4th grade teacher regarding testing in September of 2009. The teacher explained that the District had a response-to-intervention process (called the IMPACT process), and referred the child to the IMPACT team, which held a meeting without the grandparent. An educational diagnostician discussed the grandmother's request for testing with the teacher, who was of the opinion that the RtI process was an "absolute" requirement prior to referral and testing. The school's reading specialist, moreover, had assessed the boy with the SIPPS and the Flynt-Cooter instruments in October 2009, and had not found indications of dyslexia, other than low fluency rate. After more intensive intervention by the reading specialist, however, his fluency rate improved.

Meanwhile, the grandmother proceeded to obtain her own independent testing of the boy. That testing found that the student had ADHD, dyslexia, LD in basic reading, dysgraphia, and LD in written expression. It also recommended §504 services, various accommodations, and OT testing. By this time the student was receiving failing grades in three subjects. After another IMPACT team meeting, the team planned to develop a §504 plan for the student. At the §504 meeting, the grandparent was presented with a consent form for 504 evaluation and services, but was confused about what that meant and whether the school was proceeding to IDEA testing. The team noted that although the boy had responded well to interventions put into place during the IMPACT process, he "still functioned below grade level and was making slow progress in comparison with his peers." At the meeting, the grandparent provided the team with a copy of the independent evaluation conducted four months earlier. The team did not inform the grandmother specifically that she had a right to request special education testing, but a school diagnostician stated that "I have to be very strict by saying I can't . . . I can't look at your kiddo until we try some interventions . . . do a lot of interventions." Thus, the school did not provide the grandparent with a consent form for IDEA testing. It also neither initiated the referral, nor issued the guardian a notice-of-refusal form, apparently assuming there was no denial of evaluation. The Hearing Officer found that subsequent to this meeting, the diagnostician reviewed the private evaluation, and wrote in an e-mail that "we are not at a point of considering a special education evaluation for [the student] just yet, *but I did want you to know that the data we have is a good indicator that [the student] would be eligible for special education if we decided to 'go there.'*" Thus, there appeared to be an acknowledgment that *if* testing proceeded, the student would likely qualify.

When parents are confused and concerned, they are likely to seek out independent help. Here, the grandparent retained an advocate and attorney, who filed a request for due process alleging a failure to identify. In response, the District formally offered to conduct a full initial evaluation of the student. The evaluation found that the student qualified as LD in reading comprehension, and OHI because of his ADHD. At the initial ARDC meeting, the committee placed the student in special education, and provided him consultative OT services, all the accommodations in the §504 plan, and monitoring by a special education teacher in the classroom. Curiously, by this time, the student had improved in

reading fluency, as tested by the reading specialist, and apparently also passed the 4th grade state reading assessment. Thus, he actually wound up responding significantly well to the regular ed interventions provided, including dyslexia program assistance.

The Hearing Officer's Decision—Ultimately, says the Hearing Officer, there was a classic failure to communicate in this matter, “yet, the school district responded to the student’s changing needs by adding increased accommodations and interventions before the student began special education services.” The school “applied successive interventions to this program as part of the district’s RTI process beginning in September 2009.”

But, the Hearing Officer finds that as of September 2009, when the child’s doctor approached the school principal, the district had reason to know that the student was likely a student with a disability, and that the grandmother was requesting testing. “Petitioner’s grandmother made a parental request for testing for the student and, as a result, the school district had a duty to evaluate the student that overrode the district’s use of the local district RTI process—the IMPACT committee—before evaluating the student for special education.”

Note—In other words, in the Hearing Officer’s opinion, a parent’s request for IDEA evaluation can “trump” a district’s local RTI procedures and intervention sequence. Of course, the district could have chosen to reject the request for evaluation, provide the grandmother with notice of the refusal and notice of IDEA procedural safeguards.

As the student made failing grades, “the school district began applying interventions specifically focused on areas of concern in writing and reading skills, and the student began to demonstrate success with measurable increases in those skills.” Thus, although the school did not begin evaluating the student until five months later, the Hearing Officer did not find the delay unreasonable, since “the student made progress in targeted areas during the period of increased intervention.” But, the hearing officer also found that while the school had in fact refused the request for evaluation, it never provided the grandmother with written notice of the refusal, as required under the IDEA. “This is a procedural flaw.” As far as the school staff was concerned, however, they had not really “refused” the evaluation request, they had merely explained the RTI process to the grandparent and followed it as they understood it. In any event, the Hearing Officer excuses the procedural violation, since, in her opinion, it “did not seriously infringe on her opportunity to participate and develop Petitioner’s educational program...” Therefore, the Hearing Officer denied any relief. Ultimately, the fact that the District acted in a timely and increasingly proportionate fashion with its regular intervention programs saved the legal case, since the student responded well.

Note—The Hearing Officer addressed the school’s procedural violation of failing to issue a notice-of refusal when it *de facto* rejected the guardian’s request for testing. But, the Hearing Officer did not address the fact that the school also did not provide the grandparent with notice of her IDEA

procedural safeguards when it decided not to test. Other cases have held that the failure to provide notice of procedural safeguards is in fact a procedural violation that can seriously infringe on a parent's opportunity to participate. See *El Paso Ind. Sch. Dist. v. R.R.*, 50 IDELR 256 (W.D.Tex. 2008)(tacit refusal of evaluation request when parent instead agreed to interventions required provision of IDEA procedural safeguards notice).

- In the case of *Houston Ind. Sch. Dist.*, 113 LRP 2100 (SEA Texas 2012), the school denied a parent's request for evaluation of her son, who exhibited inappropriate, disruptive, and unpredictable behavior problems at school, including hitting other students. The school instead proceeded with campus team interventions that appeared to be unsuccessful. The campus principal testified that she viewed special education as a "last resort" that only takes place after interventions are exhausted. She recommended, however, looking into §504 eligibility. Ultimately, when the student's behaviors escalated, the campus team recommended IDEA evaluation, but the parent requested a hearing, arguing that the District was untimely in meeting its child-find obligation. The hearing officer agreed, finding that the school failed in its child-find obligations when, despite parent concerns and significant behavior problems on the part of the student, it persisted in implementing its RTI program, which was not having positive effects. "The school district contends that an earlier referral to special education was not warranted because it was first required to address Student's behavioral issues through its Response to Intervention (RTI) regular education program. However, the evidence showed that in fact the RTI strategies were not particularly successful. Furthermore, a school district may not use RTI strategies to delay or deny a special education evaluation or release a school district from its Child Find responsibilities."

Other RTI-Related Child-Find Disputes

- The case of *A. P. v. Woodstock Bd. of Educ.*, 50 IDELR 275 (D.Conn. 2008) previews the type of arguments schools may face in these disputes in future cases. Here, parents argued that the school improperly failed to refer an elementary grade student with some difficulties in the classroom. The student received assistance and special strategies in the classroom from his 4th grade teacher, who communicated closely with the parents. In addition, a Child Study Team (CST) met twice in his 5th grade year to consider the student and determined that he could be accommodated as a regular education student and developed action plans to address his difficulties. The parents alleged child-find violations, and argued the following points:

1. Use of CSTs were a per se violation of IDEA because they circumvented the IDEA's procedural requirements,
2. The school used the CSTs in order to prevent the parents from making a referral under the IDEA and thwarted their attempts to have him identified,
3. If use of CSTs are permitted by the IDEA, all IDEA procedural safeguards must apply during the pre-referral process, including parental participation and prior notice.

Both the hearing officer and the court found that use of CSTs was not in violation

of IDEA. “The use of alternative programs, such as CSTs, is not inconsistent with the IDEA. For it is sensible policy for LEAs to explore options in the regular education environment before designating a child as a special education student.”

Editorial Note—Indeed, the court pointed out that IDEA regulations envision the existence of pre-referral processes. Section 300.302 discusses that screening of students to determine appropriate instructional strategies “shall not be considered to be an evaluation for eligibility for special education and related services.” In a footnote, the court also cited from the USDOE commentary accompanying the regulations, where USDOE stated that nothing in IDEA prohibits states from developing and implementing policies that permit screening of children to determine if evaluations are necessary. *See Id.* at fn. 2.

Second, the court found that CSTs did not act as a “roadblock” to referral, since the parents could have requested a referral at any time and knew how to do so, since the child had been in special education at the pre-school level. Finally, the court rejected the argument that the CST meetings had to comply with all IDEA procedural safeguards. “If, as the Parents argue, any ‘meeting’ regarding a child who is having difficulties triggered the procedural protections of the IDEA, then almost any action at all on the part of the school would constitute a referral.” The court found that such a system would discourage teachers from communicating concerns about students and “prevent schools from trying alternatives for students who, while perhaps not meeting the statutory definition of a ‘child with a disability,’ are in need of extra help in order to succeed academically.”

Ultimately, the court held that the school had not failed in its child-find obligations since the student improved with regular interventions, to the point of passing the statewide assessment without accommodation. “This is decidedly not a case in which a school turned a blind eye to a child in need.” *See also, Palmyra Area Sch. Dist.*, 47 IDELR 204 (SEA PA 2007)(another example of use of CSTs as part of the pre-referral process).

Another Note—If the student was doing well and passing the state assessment, why would the parents argue IDEA eligibility? The parents’ arguments in the *Woodstock* case uncover a suspicion among some parents that the provision of regular education interventions to struggling students, some of whom may have disabilities, serves to deny them the procedural safeguards and legal protections of IDEA. Ironically, the need to protect IDEA-eligible students and their parents with the formidable procedural and legal protections of the IDEA also creates a desire to access those protections, apparently even in cases where the regular interventions are sufficient to meet the student’s needs. Certainly, for students with disabilities whose needs are met through regular interventions, there are no IEPs, IEP team meetings, SEA complaints, IDEA due process hearings, mediation, independent evaluations, etc...

- *What if the parents request a referral while the school is in the process of implementing high-quality research-based interventions?*—The regulations answer that question. Ostensibly, one way the regulations could have dealt with this situation would have been to allow school districts a certain timeframe if they were implementing RtI

programs for a struggling child, say six months, during which it would not have to undertake evaluations at parent request. This scheme would have allowed schools to implement RtI programs, and thus allow for the use of the RtI-based evaluation option in §300.309(a)(2). Instead, the regulation states that referral must take place if either the student has not made adequate progress after an appropriate period of regular interventions, or whenever the child is referred for evaluation (i.e., a parent request for referral).

The Feds comment on the regulation—USDOE clarifies that the regulations allow a parent to request an evaluation that would take place within the normal 60-day timeline for initial evaluations, RtI process or not. “[W]e will combine proposed §300.309(c) and (d), and revise the new §300.309(c) to ensure that the public agency promptly requests parental consent to evaluate a child suspected of having an SLD who has not made adequate progress when provided with appropriate instruction, which could include instruction in an RTI model, and whenever a child is referred for an evaluation. We will also add a new §300.311(a)(7)(ii) to ensure that the parents of a child suspected of having an SLD who has participated in a process that evaluates the child’s response to scientific, research-based intervention, are notified about the State’s policies regarding collection of child performance data and the general education services that will be provided; strategies to increase their child’s rate of learning; and their right to request an evaluation at any time.” 71 Fed. Reg. 46,658. Put another way, “[i]f parents request an evaluation and provide consent, the timeframe for evaluation begins and the information required in §300.309(b) must be collected (if it does not already exist) before the end of that period.” Id.

RtI “opt-out” by parents—Can a parent then basically opt out of the use of an RtI process by simply requesting an evaluation at an early stage of the process and refusing to agree to an extension of the 60-day timeline...? USDOE argues that this concern should not be overstated. “Models based on RTI typically evaluate the child’s response to instruction prior to the onset of the 60-day period, and generally do not require as long a time to complete an evaluation because of the amount of data already collected on the child’s achievement, including observation data. RTI models provide the data the group must consider on the child’s progress when provided with appropriate instruction by qualified professionals as part of the evaluation.” 71 Fed. Reg. 46,658. If not, then the team will have to do with whatever RtI data can be gleaned within the 60-day timeline, keeping in mind that it will also need time to undertake the other components of the comprehensive evaluation and complete a written report. Thus, this provision will most significantly impact schools that implement lengthy interventions as part of an RtI model.

- *What if the parent requests a special education evaluation, but then agrees to give regular education interventions a try first?* These situations can get complicated. Are these situations where a parent simply changes her mind about the referral, or rather, are these situations where the school has in fact refused to proceed with the evaluation? In the case of *Scott v. District of Columbia*, 45 IDELR 160 (D.D.C. 2006), after a parent notified the school that her third-grade son was diagnosed with ADHD, the school met with her and the parties agreed to a plan of “alternative strategies” to address

attentional problems and other issues. Although the student was “on target” academically, the parent filed an action alleging a child-find violation. The court interpreted the situation as one where, despite the parent’s agreement to “alternative strategies,” the school still had an obligation to evaluate the student. “No provision of the IDEA supports [the school’s] contention that a parent’s acceptance of the use of ‘alternative strategies’ relieves a school district of the obligation to comply with the ‘child-find’ provisions of the Act.”

Editorial Note—But is not information on the student’s response to regular education interventions important to the determination of whether he is in need of special education services? That determination is required for IDEA eligibility. Why is parental agreement to regular education interventions in this situation not interpreted, instead, as a withdrawal of their original evaluation request? What if solid documentation supports the withdrawal of the referral and the parent’s agreement to the intervention plan? What if the documents demonstrate that the parent no longer wishes to proceed with the evaluation?

These complications arose similarly in *El Paso Ind. Sch. Dist. v. R.R.*, 50 IDELR 256 (W.D.Tex. 2008)(vacated on other grounds), where the parent of a struggling student approached the school about the possibility of a referral for special education evaluation. The school convened a meeting of their Student Teacher Assessment Team (STAT), a regular education committee that provided a variety of interventions, including accommodations, tutoring, and Saturday tutoring camps. The court found that the record established that the parent agreed to the STAT interventions and, thus, to forego special education testing. But, the court held that although the parent agreed to forego the evaluation, the school should have provided her with notice of IDEA procedural safeguards and written notice of its refusal to evaluate the child. “Nowhere in either the text of the IDEA or the federal regulations have exceptions been carved out to relieve local educational agencies of this responsibility when a parent agrees with the agency’s refusal to evaluate. ... [W]hether parents agree to the refusal or not, local educational agencies must comply with their IDEA responsibility to provide written notice upon their refusal to evaluate a child for special education services.”

Editorial Note—Of course, the District’s contention would be that it never *refused* the evaluation. Together with the parent, the District developed a plan of regular interventions to attempt, and the parent withdrew any constructive request for evaluation. Should the school be liable for delays in the ultimate identification of a special education child occasioned by a good-faith agreement between parent and school to attempt regular education interventions prior to initiating testing? Certainly, there will be situations where the regular interventions serve to correct the child’s problems and no evaluation will be necessary. But, inevitably, there will be situations where the student does not respond to interventions as well as hoped, and ultimately, a special education evaluation finds them eligible for special education services. In the latter situations, is there always the spectre of legal liability for the school?... The following cases attempt to answer the question.

- *What if the interventions fail and the child winds up in special education after all?—A Texas hearing officer ruled that it could not “fault the School District for attempting an RTI program and find that Student was denied a FAPE as a result of the delay in referring Student for special education.” **Salado Ind. Sch. Dist., 108 LRP 67655 (SEA TX 2008)**. The hearing officer found that all stakeholders had worked collaboratively in providing pre-IDEA interventions. “The Hearing Officer cannot fault [the] school district for not timely referring a student for special education where the school district attempted an RTI program which eventually resulted in the student’s referral for special education.”*

*Editorial Note—*The case above, however, shows that there can be litigation even where all stakeholders, including the parent, collaboratively agreed to attempt regular education interventions prior to a special education referral. Note, therefore, how the hearing officer took care to point out that the provision of interventions was accomplished collaboratively with the parents. In all likelihood, cases will emerge where the decision-making is not made on a consensus basis, thus giving the parents more room to argue that use of RTI programs served to delay eventual special education services, and that they have an arguable claim for compensatory services.

Another case where the school attempts interventions in regular education, only to later qualify the child after an evaluation is *S. v. Wissahickon Sch. Dist., 50 IDELR 216 (E.D.Pa. 2008)*. There, a Pennsylvania school provided interventions to a student with ADHD who performed well from third through sixth grade, but then started failing to complete work and attend school regularly. When the parents requested an evaluation, the report indicated he had ADHD and a math disorder, and an IEP was developed. The parents, however, claimed that the school was late in identifying the student for an evaluation. The court noted that several teachers saw no problems with inattention or impulsivity, but rather felt that frequent absences and failure to complete homework were the cause of his declining performance after the sixth grade. And, as the student began to struggle, the school responded with specialized progress reports, an “agenda book” to organize assignments, and frequent conferences with the parents. The court agreed with the hearing officer that there was no child-find violation. “Richard was an average student who made meaningful educational progress, but exhibited low motivation and a disinterest in academic work.” In light of his performance, the reasons for the subsequent decline in his performance, and the interventions attempted by the school, there was no failure in the child-find process.

*Editorial Note—*This case shows how different decision-makers can reach different conclusions with the same child-find scenario. An appeals panel that reviewed the hearing officer’s findings that there was no child-find violation felt that the fact that the student had been diagnosed at an early age, together with the later decline in school performance should have led the school to evaluate him soon after he began experiencing problems. The key here appears to be that the student’s problems seemed directly traceable to non-disability factors, such as attendance and attitude toward schoolwork. In many cases, however, the reasons for declining

performance are mixed and much less clear.

Yet another example of an RtI-era failure-to-identify case is *Lake Park Audubon Ind. Sch. Dist. #2889*, 50 IDELR 117 (SEA MINN 2008), where a school district attempted intervention plans for a kindergarten student with academic and behavior problems. When she exhibited problems learning letter names, letter sounds, numbers, and counting, while also displaying impulsive and hyperactive behavior, the school developed an “Academic Improvement Plan.” The school noted that she was in a foster home and perhaps needed some time to adjust to school. The student then transferred to the District in question, where additional interventions were put into place. Although the student showed some improvement, she was nevertheless retained in kindergarten due to her overall skill levels and the interruption in her academic learning due to life transitions, including two foster homes in different parts of the state within six months. After the retention, the student was again referred to a “teacher assistance team” for pre-referral interventions. When that round of interventions did not show much success, the school evaluated her for special education and she met criteria for LD. The parents alleged that there was a failure to timely identify and evaluate the child. The hearing officer disagreed, finding that state law required schools to attempt, if possible, two types of regular education interventions prior to referral. Moreover, the hearing officer pointed to the child’s complicated home situation, stating that “given the Student’s age and multiple home placements, it is reasonable for the District to have attempted other strategies prior to initiating a special education evaluation.”

Editorial Note—The decision above does not discuss what method was used to determine that the student was LD. And, there is no indication that the school worked with the foster parents to reach agreement on pursuing the pre-referral interventions. From the written opinion, it appears that school staff made decisions on types of interventions and renewing rounds of interventions.

A hybrid scenario is illustrated in the case of *Dowington Area Sch. Dist.*, 107 LRP 63155 (SEA PA 2007), a student experiences academic difficulties, is provided a variety of regular education interventions, continues to experience difficulty, is ultimately evaluated, qualifies as LD, and the parents allege a failure to timely identify. The variant here is that the student was evaluated twice for special education, but after the first evaluation was determined to not be in need of special education, as his “Instructional Support Team” interventions were deemed sufficient to meet his needs. The student was provided academic supports, reading intervention, and DIBELS (Dynamic Indicators of Basic Early Literacy Skills) progress monitoring. Although the student showed initial “steady progress in all areas and a continued response to remediation,” the progress eventually slowed and the student began to experience anxiety about school, leading the parents to place him in a private school setting. The hearing officer rejected the failure-to-timely-identify claim, finding that since the student was responding to regular education interventions, the District did not fail in its child-find obligations. Then, when the student’s progress slowed, the IST recommended re-evaluation, and he was evaluated and placed accordingly.

Editorial Note—This case is an example of a student that initially responds well to interventions, but the progress slows and difficulties continue. Continuous progress monitoring and quick action when difficulties re-arose saved the school in this case. The lesson for schools is to not fall asleep when high-quality interventions appear to be working, as the progress may slow and new decisions may have to be made.

- *Are child-find disputes possible even when students appear to be improving with regular ed interventions?* You bet. In the case of ***Pajaro Valley Unified Sch. Dist.*, 109 LRP 31586 (SEA California 2009)**, a 6th-grader was advancing from grade to grade with some difficulty in writing, on-task attention, and turning in homework. His 4th grade teacher attempted classroom interventions that were tracked in a log. At the beginning of 5th grade, the parents requested evaluation, and also obtained a private evaluation. The student was never retained. The District met to review the evaluations but determined the student was not IDEA-eligible. The parents obtained additional evaluations and filed for a hearing claiming a child-find violation. The hearing officer found that the school acted appropriately in the 4th grade in attempting regular education interventions prior to resorting to an IDEA referral. Some of the private evaluations advocated for eligibility as LD. But, the school did not act inappropriately in following the assessment data that indicated that the student was improving in language arts standardize testing year after year, and that the student would continue to improve without special education services, as long as the school addressed his problems focusing and completing homework. See appeal at *E. M. v. Pajaro Valley Unified Sch. Dist.*, 112 LRP 13554 (N.D.Cal. 2012)(upholding hearing officer's decision and school's use of results from cognitive assessments).

Similarly, in ***Montgomery County Bd. of Educ.*, 51 IDELR 259 (SEA Alabama 2008)**, a hearing officer rejected a child-find claim on a 4th-grade African-American girl with failing grades in math and occasional defiant and aggressive behavior. The school responded with "pre-referral" interventions, as required under the Alabama Administrative Code. The state regulations called for at least eight weeks of such interventions prior to an IDEA referral. Moreover, an intervention team ("Building Based Student Support Team") was monitoring the student's progress, and a "positive behavior plan" and counseling were put into place. The student's math grades improved after intervention, and her behaviors were not so serious as to suspect an emotional disturbance. The hearing officer noted that the State of Alabama, through a federal court consent decree, was specifically working on reducing overidentification of African-American students as MR or ED, and that the consent decree called for pre-referral interventions in these cases.

Note—Notice the depth of regular interventions available in this school: a team structure, possibility for a simplified FBA and BIP, counseling services, and progress monitoring. On another point, can a state regulation mandate a time certain of interventions be provided, in all cases, prior to a special education referral? Could such a requirement run afoul of the IDEA?

Steps to Minimize Child-Find Disputes in RtI-Capable Districts

- From an IDEA liability standpoint, the main challenge for schools attempting to implement interventions for struggling students prior to referral for a special education evaluation is avoiding failure-to-identify or failure-to-timely-identify claims. The tightrope schools must walk is between making effective use of regular education interventions while also respecting parent rights and child-find obligations under the IDEA. The key, as exemplified in the *Salado* case reviewed above, may lie in involving parents as partners in the decisions regarding regular education interventions and the timing of a special education evaluation. This effort could include the following steps:

1. Providing parents with information on the range of regular education interventions available,
2. Meeting with parents to discuss intervention options, agreed timelines, and courses of action,
3. Making clear to parents their right to request an IDEA evaluation,
4. Reaching a consensus on a course of action,
5. If a decision is made to pursue regular education interventions, progress data must be shared with parents frequently,
6. Follow-up communication regarding progress or lack thereof,
7. Follow-up meetings to review progress and renew consensus on current course of action,
8. Documentation of the steps above.

Parents that are partners in the intervention decision-making process will be less likely to raise legal challenges, and evidence of consensual action will be important should the matter lead to litigation. The issue is of importance, because there will be situations where even after application of high-quality interventions, the student does not make sufficient progress, an IDEA evaluation takes place, and the student is placed in special education. Thus, parents must be informed that there are no guarantees that regular education interventions will work.

Practical Note—States and schools are starting to develop informational brochures that help describe the continuum of available interventions for struggling students and the process by which the services are accessed, data is generated, and progress is reviewed. See, e.g., Parent’s Guide to Early Intervening and Response to Intervention: Arizona’s K-8 Plan, A Primer for Parents (November 2006, Arizona DOE); A Family Guide to Response to Intervention (RtI) (2008, New Jersey Parent Information Center).

Another Practical Note—It may be wise for schools to document meetings with parents, parents’ positions, consensual decision-making, agreements to pursue interventions for a given time, etc... If conflicts arise later, the documentation may prove crucial to proving the factual chronology and the school’s attempts to make decisions in collaboration with parents.

Notices to parents—If the school is in a situation where the parent initially seemed to request a special education evaluation, but then agreed to attempt regular

education interventions after being provided information on these interventions, it may be wise to provide the parents with a notice of the decision to forego interventions by agreement, and notice of IDEA procedural safeguards. These notices can help ensure that parents are fully “on board” with the educational decision being made, and can be useful should there be a later dispute.

Misconceptions About the Role of RtI in LD Evaluations

- The advent of RtI-oriented intervention programs, together with the modernization of the LD evaluation process has given rise to misunderstandings regarding the role of RtI in the evaluation. Some of these misconceptions include the following:

RtI interventions are a mandatory prerequisite to LD evaluation

Intervention programs must be implemented for the entire period of instruction recommended by the producers before decisions on IDEA evaluation can be made

In tiered intervention models, all tiers must be completed prior to referral

Data from RtI intervention programs is a legally required part of an LD evaluation

The most entrenched misconception involves the issue of RtI data as part of LD evaluations. The 2006 regulation *allows* for part of the evaluation to include a determination of whether a child responded to high-quality research-based interventions, but it does not require it. 34 C.F.R. §300.309(a)(2)(i); see also OSEP *Memorandum to State Directors of Special Education* (OSEP, January 21, 2011). Indeed, from a practical standpoint, the regulation could not have required such a determination, since many schools would have been unequipped to provide those interventions. This is why the regulation also allows for the option of an assessment-based determination focusing on patterns of strengths and weaknesses in assessment scores. 34 C.F.R. §300.309(a)(2)(ii). Moreover, the component of the LD evaluation under which the team must rule out that the performance difficulties are not caused by lack of appropriate instruction does not *require* evidence of high-quality research-based instruction or interventions. Nothing in the regulations or guidance would prohibit use of regular classroom periodic progress assessments (i.e., classroom quizzes and tests) to meet this requirement.

- At its core, 34 C.F.R. §300.309 envisions a four-element system for LD evaluations:

1. **A determination that the child is not achieving adequately for their age or to meet state standards;**
2. **Either (A) a determination that the child is not making sufficient progress to meet age or state standards using an RtI process, or (B) a**

determination that the child exhibits a pattern of strengths and weaknesses relative to age, state standards, or IQ, using appropriate assessments;

- 3. A determination that the team’s findings on the above are not primarily the result of visual, motor, or hearing disabilities, MR, ED, or cultural, environmental , economic disadvantage, or limited English proficiency; and**
- 4. A consideration, as part of the evaluation, of data that demonstrates that prior to evaluation, the child was provided appropriate instruction in regular settings, including data-based documentation of repeated assessments of achievement at reasonable intervals, which is shared with parents.**

The provision that implicates RtI is the second component. That specific subsection of the regulation states that the component requires the following findings:

- (i) the child does not make sufficient progress to meet age or State-approved grade-level standards in one or more of the areas identified in paragraph (a)(1) of this section when using a process based on the child’s response to scientific, research-based intervention; or
- (ii) the child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State-approved grade-level standards, or intellectual development, that is determined by the group to be relevant to the identification of a specific learning disability, using appropriate assessments, consistent with §§300.304 and 300.305. 34 C.F.R. §300.309(a)(2).

Thus, after the step of determining that the student is not achieving adequately, subsection (a)(2) of the regulation offers a choice—either (1) determine that the student has not made “sufficient progress to meet” state standards by use of an RtI process (i.e., assess a student’s level of response to high-quality scientifically sound regular interventions), or (2) resort to the “strength-and-weaknesses” pattern assessment option

- *What does the U.S. Department of Education interpret as RtI?*—OSEP states that while there are a number of RtI models, and it does not endorse any specific model, certain key components must be present. “These components include: (1) high quality, evidence-based instruction in general education settings; (2) screening of all students for academic and behavioral problems; (3) two or more levels (sometimes referred to as “tiers”) of instruction that are progressively more intense and based on the student’s response to instruction; and (4) progress monitoring of student performance.” *Letter to Zirkel*, 113 LRP 38320 (OSEP 2013); see also *Letter to Dale*, 60 IDELR 166 (OSEP 2012). Thus, whether a district’s intervention program qualifies as an “RtI” program for purposes of the regulation above depends on whether the key components listed are present.

- *OSEP position on topic*—In a 2011 letter reviewed above, OSEP indicated that “it

has come to the attention of the Office of Special Education Programs (OSEP) that, in some instances, local educational agencies (LEAs) may be using Response to Intervention strategies to delay or deny a timely initial evaluation for children suspected of having a disability.” *Memorandum to State Directors of Special Education*, 56 IDELR 50 (OSEP 2011). That letter also reiterates that the IDEA and its regulations currently only “allow” the use of RtI data, as part of the criteria for determining if a child has a specific LD. Thus, the memo concludes that “it would be inconsistent with the evaluation provisions at 34 CFR §§300.301 through 300.111 for an LEA to reject a referral and delay provision of an initial evaluation on the basis that the child has not participated in an RTI framework.” In addition, OSEP has extended that position to highly mobile students transferring from other districts while IDEA evaluations were pending in the previous districts. See *Letter to State Director of Special Education*, 61 IDELR 202 (OSEP 2013)(“If a child transfers to a new school district during the same school year before the previous school district has completed the child's evaluation, the new school district may not delay the evaluation or extend the evaluation time frame in order to implement an RTI process.”)

- *Avoiding unilateral decision-making*—The safest course of action for schools may be to avoid unilateral decisions on regular education interventions, including decisions on timelines for interventions, types of interventions (from those available at the school), schedules for progress monitoring, and most importantly, the point at which to initiate an IDEA evaluation. Certainly, the school stands in the best position to defend its actions if they are undertaken in agreement with the parents, and the parents are informed that they are free to request an IDEA evaluation at any time. The difficult cases for schools, on the other hand, are likely to be ones where school staff unilaterally decide on interventions, discourage a parental referral for evaluation, or indicate that a time certain for interventions must be exhausted prior to referral in all cases.
- *Parent consent and RtI data collection*—A recent OSEP letter indicates that while data collection in early intervention tiers, which is only used to determine behavioral or educational needs in the RtI program, does not require parental consent, data collection that will be used to determine potential LD eligibility or need for special education services would require prior written parental consent. *Letter to Gallo*, 61 IDELR 173 (OSEP 2013). OSEP states: “parental consent is not required to collect data from all students in a general education setting at the primary level of an RTI framework, because the data collection would not be focused on the educational and behavioral needs of an individual child. Parental consent also would not be required to review such data when conducting an evaluation of a child under 34 CFR §300.305, because the data would be considered “existing evaluation data.” 34 CFR §300.300(d)(1)(i). However, parental consent would be required if, during the secondary or tertiary level of an RTI framework for an individual student, a teacher were to collect academic functional assessment data to determine whether the child has, or continues to have, a disability and to determine the nature and extent of the special education and related services that the child needs.”
- *Quality of RtI programs*—Because there are no established guidelines for RtI programs in the IDEA or its regulations, the nature and structure of programs vary

widely from district to district across the U.S. Some programs are sophisticated, well-structured, competently staffed, high-quality, fully research-based, and supported by the appropriate level of training and funding support. Other programs are loosely structured, not really research-based, and lacking in appropriate staff training and funding commitment. Programs run the entire spectrum of quality. Schools must keep the relative quality of their intervention programs in mind when proposing them to parents concerned about their children's classroom performance.

- *Analyzing district-wide data on effectiveness of RtI programs*—Districts that invest resources and time on RtI-oriented intervention programs should also study the effectiveness of the interventions on school-wide and district-wide bases. The important question to answer with the data is the degree to which the interventions are proving effective in reducing the need for special education referrals. In other words, what districts need to know is whether their RtI program is actually yielding positive results in the form of significant student response and improvement, to the point that the need for IDEA referrals is reduced. If the data shows that a substantial number of students who, in the past, would have been referred to special education in fact improve significantly with the interventions and thus do not need referral, then the program is being successful. If, on the other hand, most of the students that would have been referred in the past simply get referred at a later time—after a potentially-lengthy intervention period—then the program could appear to simply be slowing down or delaying the eventual referral and evaluation process. Certainly, the RtI movement, particularly with respect to the LD population, did not intend to replace a the discrepancy-based “wait-to-fail” LD model with yet another version of a “wait-to-fail” model—one that requires failure in potentially lengthy RtI programs prior to referral to IDEA.

- *The requirement of need for special education*—It's easy to forget that IDEA eligibility requires two separate findings: (1) meeting of state and federal criteria for at least one IDEA disability eligibility category, and (2) a resulting need for special education (i.e., specially-designed instruction). 34 C.F.R. §300.8(a)(1). A difficulty is presented, however, when a school is capable of successfully providing high-quality and beneficial individualized instruction to a student with disabilities as part of its regular education program. This scenario raises a host of related eligibility questions: Does the student not require “specially-designed instruction”? Or instead, does this mean that the student no longer needs to have such instruction by accessing federal or state IDEA funding? Can Congress require schools to provide access to specially-designed instruction *only* by means of its federally-funded mechanism, even when a local means exists to provide such instruction outside of special education? Or, rather, does the IDEA pact between a state and the federal government imply an agreement that the state will meet the needs of students with disabilities only under the IDEA model? These questions are likely to be fodder for legislative discussion as IDEA is reauthorized in the RtI era.